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IN THE

Supreme Court of the United States

LIFE PARTNERS, INC.

PETITIONER,

V.

THEODORE V. MORRISON, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VIRGINIA STATE CORPORATION COMMISSION, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF THEODORE V. MORRISON, JR., MARK C. CHRISTIE, AND JUDITH W. JAGDMANN, COMMISSIONERS OF THE VIRGINIA STATE CORPORATION COMMISSION, AND ALFRED W. GROSS, VIRGINIA COMMISSIONER OF INSURANCE

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QUESTIONS PRESENTED

Whether, aside from the effect of the McCarran-Ferguson Act, 26 U.S.C. § 101(g)(2) operates to insulate the Virginia Laws from challenge under the dormant Commerce Clause of the United States Constitution.

Whether the United States Court of Appeals for the Fourth Circuit erred in holding that the McCarran-Ferguson Act insulates the Virginia Viatical Settlements Act and accompanying regulations (the "Virginia Laws") from challenge under the dormant Commerce Clause of the United States Constitution.

Whether the Virginia Laws should be upheld against challenge under the dormant Commerce Clause of the United States Constitution because the Virginia Laws are not discriminatory, and their benefits clearly outweigh the incidental burdens of compliance, under the method of analysis set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) and as conducted by the District Court.

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STATUTES INVOLVED

The McCarran-Ferguson Act

15 U.S.C. §§ 1011 *et seq.*, and 26 U.S.C. § 101 are implicated in this appeal.

15 U.S.C. § 1011 (Section 1)

Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012 (Section 2)

Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . [the Sherman Act, Clayton Act, and Federal Trade Commission Act] shall be

applicable to the business of insurance to the extent that such business is not regulated by State law.

26 U.S.C. § 101

(g) Certain Death Benefits. (See Appendix for full citation)

INTRODUCTION

The Court should deny the petition for writ of certiorari because this case does not involve an unsettled issue of federal law, and the decision of the U. S. Court of Appeals for the Fourth Circuit neither conflicts with any decision of this Court nor with a decision by any other United States court of appeals. State laws regulating the resale of insurance policies on the lives of terminally ill people fall within the core protection conferred by the McCarran-Ferguson Act, and in fact are the product of federal legislation that encourages states to legislate in precisely the manner the Commonwealth of Virginia has legislated. The Fourth Circuit correctly affirmed dismissal of this lawsuit against the Commissioners of the Virginia State Corporation Commission and the Virginia Insurance Commissioner.

STATEMENT OF THE CASE

A viatical settlement is a transaction in which a terminally or chronically ill person (a "viator") sells a life insurance policy for an amount less than its face value. Texas-based Life Partners, Inc. ("LPI") is a viatical settlement provider. LPI works with brokers to identify viators and consummate transactions with residents of Virginia and other states. LPI is licensed in Texas by the Texas Insurance Department, but is not licensed in Virginia. Court of Appeals Joint Appendix ("C.A.J.A.") 16, 27. According to LPI's expert, viators with short life expectancies have impaired judgment, and suffer from "optimism bias." Hence, they tend to overestimate their life expectancy and are thus likely to "accept less than the actuarially fair value

on their policies." He added, "when people are making large economic decisions at a time when they're most vulnerable, they're prone to big mistakes." C.A.J.A. 127-131.

Model Act and Regulations

Because of the need to protect viators, as LPI's own expert tacitly recognized, and in order to create a fair viatical settlements market, the National Association of Insurance Commissioners ("NAIC") adopted a Model Viatical Settlements Act (the "Model Act") in 1993. The NAIC adopted Model Regulations in 1994. C.A.J.A. 99-100.

The Model Act provides for state licensing of viatical settlement providers and brokers. Applicants must disclose their owners, file a plan of operation, prove their good character and financial soundness, adopt an anti-fraud plan, appoint an agent for service of process, and file annual reports. The state insurance commissioner has authority to approve forms of contract. Providers must make detailed disclosures to viators. The viator has the right to rescind, and only providers licensed in the viator's state may monitor the viator's health. Abusive practices are barred. Providers must have a system of control over advertisements, which must conform to certain standards. Misleading advertisements are prohibited. Violations are an unfair trade practice. The Model Act authorizes the insurance commissioner to adopt regulations to ensure reasonable payments to viators. C.A.J.A. 48-85.

The Model Regulations implement the policies expressed in the Model Act. License requirements are rigorous. The Model Regulations set forth two pricing alternatives. One specifies percentage amounts of the face value, depending on the viator's life expectancy. For example, if a viator's life expectancy is less than 6 months, the minimum payment is 80% of the face value. For longer life expectancies, the minimum payment decreases to a smaller percentage of face value. For life expectancies above 25 months, the viator must receive the greater of cash surrender value or accelerated death benefit. The other alternative provides generally that the viator must receive a reasonable price, based on various criteria, such as the viator's age and life expectancy, face amount of policy, and other considerations. C.A.J.A. 86-95. Virginia adopted the first pricing alternative.

Virginia Viatical Settlements Act and Regulations

The Virginia Viatical Settlements Act was adopted in 1997 and revised in 2003. That statute granted enforcement responsibility and rule-making authority to the State Corporation Commission ("SCC").

The Virginia Laws largely track the Model Act and Regulations. The Virginia Laws: (i) require that providers be licensed and of good character, and that disclosures be made to viators before they are asked to sign any document (Va. Code § 38.2-6002 and 6007); (ii) establish general rules and regulations regarding advertising to viators (Va. Code § 38.2-6008 and 6010-11); (iii) impose requirements for fraud prevention (Va. Code § 38.2-6011); (iv) protect

viators' privacy (Va. Code § 38.2-6005); (v) require pre-clearance of forms of contract (Va. Code § 38.2-6003); and impose duties on insurers (Va. Code § 38.2-6008(A)(3). The SCC regulations were issued in 1997, revised in 2003, and: (i) limit contacts with viators to determine their health status (14 V.A.C. 5-71-90.D); (ii) establish minimum prices (14 V.A.C. 5-71-60); (iii) prohibit unfair and abusive practices by viatical providers and brokers; and (iv) prescribe duties and regulate practices of insurers with respect to policies that are viaticated (14 V.A.C. 5-71-93 – Insurance Company Practices).

The Virginia Laws define viatical brokers as fiduciaries for the provider, not for the insured, absent written agreement to the contrary (14 V.A.C. 5-71-50), because in viatical settlements, brokerage commissions are figured as a *percentage of face value* of the policy, not the sales price. C.A.J.A. 378-79, 843. In other words, viatical brokers make the same commission whether they obtain a high price–or a low price—for a viator.

The Jane Doe Transaction

Jane Doe, a terminally ill resident of Virginia, with a life expectancy of 6-18 months, owned a life insurance policy with a face value of $115,000. Using a New Jersey broker with whom she had a written agreement, Doe sold her policy in 2004 to a group of investors organized by LPI. LPI paid Jane Doe $29,900, 26% of the policy's face value. C.A.J.A. 16-18, 20, 125. This was much less than the 60% of face value minimum price (*i.e.*, $69,000) established by Virginia law for someone with an 18 month life expectancy. C.A.J.A. 18, 25. Jane Doe learned of the

Virginia Laws and demanded that LPI pay her the amount due by law. LPI refused. Doe filed a complaint with the Bureau of Insurance, a division of the SCC, which began enforcement proceedings against LPI. LPI then filed this 42 U.S.C. § 1983 action, alleging that the Virginia Laws violate the dormant Commerce Clause of the U. S. Constitution. The District Court held that the Virginia Laws did not impermissibly burden interstate commerce, and dismissed the case. *Life Partners, Inc. v. Miller,* 420 F. Supp. 2d 452 (E.D. Va. 2006). The Fourth Circuit affirmed, finding the Virginia Laws to be protected by the McCarran-Ferguson Act. *Life Partners, Inc. v. Morrison,* 484 F.3d 284 (4th Cir. 2007).

Jane Doe's viatical settlement had numerous Virginia contacts. From Virginia, Doe forwarded her application to the broker. The New Jersey broker called Doe in Virginia with LPI's offers. From Virginia, Doe told her broker that she accepted the offer from LPI. LPI sent transaction documents to Doe in Virginia. LPI called Doe in Virginia several times, and from Virginia Doe called LPI. Doe received the contract in Virginia, accepted it in Virginia, signed the contract forms in Virginia, and from Virginia, Doe returned the package to LPI. C.A.J.A. 17-19. LPI continues to monitor Virginia-resident Doe's medical condition. C.A.J.A. 123-24. Indeed, there is no evidence that Doe ever left Virginia during the entire viatical transaction.

LPI brings only an as-applied challenge to the Virginia Laws, not a facial challenge. C.A.J.A. 699.

REASONS FOR DENYING THE PETITION

Viatical Settlements Involve Insurance Companies

In its Question Presented, LPI states that "viatical settlements do not involve insurance companies." That statement is wrong, and reflects a fundamental misunderstanding of how viatical settlements operate.

When an insurer underwrites a policy (*e.g.*, it agrees to let the insured transfer the risk of untimely death from the insured to the insurer), the insurer makes assumptions about lapse and surrender rates. These assumptions directly affect the insurer's determination of how it will spread its risk, *i.e.*, whom it will choose to insure. An insurer's determination of how many policies will lapse or be surrendered is directly *and adversely* affected by viatical settlements. Because an investor-owned policy will neither lapse nor be surrendered (the investors will ensure that neither event occurs in order to protect their eventual profit), the insurer's actuarial risk is necessarily distorted. The more policies viaticated, the greater the distortion of risk. Hence, the calculations of the insurer as to (i) how many policies to issue, (ii) underwriting criteria, (iii) the estimated timing of payouts, and (iv) reinsurance analysis, all change when policies are viaticated, as the Fourth Circuit observed. *See Life Partners,* 484 F.3d at 293-95; C.A.J.A. 96-98. Thus, viatical settlement transactions have a critical impact on the risk-spreading profile of life insurance companies. C.A.J.A. 96-98.

In addition, the sale of a policy alters three key elements of the insurer-insured relationship: (i) a new entity has the right to designate and change beneficiaries; (ii) the recipient of life insurance proceeds has changed; and (iii) responsibility for the payment of premiums has changed. Also, prior to viatication, an insured may choose to live a life of unfettered privacy. Afterwards, the viator's place of residence and medical condition will be known to the provider, the broker, and to the investors. C.A.J.A. 849 (para. 3.3). The provider must also maintain active contact with the insured in order to keep advised of the insured's medical condition.

Moreover, the insurer must deal directly with a viatical provider (in addition to dealing with the insured) when documenting that the transfer is taking or has taken place, that all of the proper forms are completed, and that the sale of the policy actually occurs. Also, when a policy is viaticated, the insurer must follow procedures set forth in Va. Code § 38.2-6008(A)(4), including notifying the provider if it "intends to pursue an investigation regarding possible fraud or the validity of the insurance contract." The insurer must also respond to requests from viatical providers or brokers for verification of insurance coverage prior to a proposed viatical settlement. *See* 14 V.A.C. 5-71-93.

Viatical transactions also present potential complications affecting the insurer-insured relationship. Indeed, in the Jane Doe transaction at issue here, for nearly a year the insurer believed (mistakenly, as it turned out) that Jane Doe owned the policy – at a time that LPI claimed that it owned the policy. C.A.J.A. 104.

Viatical settlements thus not only involve insurance companies, they require active participation by insurance companies.

Internal Revenue Code

LPI mentions 26 U.S.C. § 101(g)(2) once, in a single sentence, as evincing the federal government's stimulation of the viatical settlement market by making proceeds of a viatical settlement tax-free. Petition, p. 6. It is understandable that LPI gave short shrift to this statute, because to have given it protracted shrift, as is due Congress's only statement on viatical settlements, would have undermined LPI's case to the point of collapse. In that statute Congress *authorized* the Virginia Laws now under attack by LPI, and *endorsed* minimum prices for viatical settlements about which LPI so strenuously complains. Accordingly, even before addressing the McCarran-Ferguson Act, the Virginia Laws will in any event survive challenge under the dormant Commerce Clause because Congress authorized viatical settlement regulation by the States, in the very form adopted by the Commonwealth of Virginia.

Where Congress has authorized States to regulate commerce in a specific way, such laws are immune from dormant Commerce Clause challenges, regardless of any impact the laws may have on interstate commerce. *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983); *see also Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 782 (4th Cir. 1996), *cert. denied*, 535 U.S. 904 (2002). As this Court stated in *South-Central Timber Dev., Inc. v. Wunnicke*, 467

U.S. 82, 87-88 (1984), it is "clear that Congress may 'redefine the distribution of power over interstate commerce' by permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible." *Id.* (quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 769 (1945). In *Northeast Bancorp v. Board of Governors, FRS,* 472 U.S. 159, 174 (1985), the Court said, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."

In order for a state law to be insulated from the dormant Commerce Clause, congressional intent to authorize the discriminating law must be either "unmistakably clear" or "expressly stated." *South-Central Timber,* 467 U.S. at 91-92. That does not mean that Congress must say that it intends to override the dormant Commerce Clause, but it does mean that Congress must have affirmatively contemplated the challenged state legislation. *Id.*

Fatal to LPI's dormant Commerce Clause challenge is the fact that Congress expressly authorized state regulation of viatical settlements. Congress did so emphatically: by providing that proceeds of viatical settlements would be exempt from federal income tax (i) when the provider is "licensed . . . in the State in which the insured resides," or (ii) if the provider is not licensed by the viator's state, when the viatical settlement provider meets both the requirements of sections 8 and 9 of the Model Act (concerning disclosures and post-sale contacts) as well as the *pricing* regulations prescribed in the Model Regulations. *See* 26 U.S.C. § 101(g)(2)(B)(ii)(I-II). Congress thus made it

"unmistakably clear" that it expected States to enact laws providing for the licensing of viatical providers and "plainly authorized" States to do so.

By conditioning tax-free proceeds on the provider being licensed in the viator's state of residence, Congress anticipated (indeed, encouraged) a multi-state licensing regime. Moreover, Congress itself adopted the Model Regulations' price floors in § 101(g)(2)(B)(ii)(II), and those mirror Virginia's percentage-of-face-value price floors in 14 V.A.C. 5-71-60. C.A.J.A. 91, 101. The federal price floors prove Congress (i) deemed price regulations for viatical settlements to be salutary, and (ii) must have expected some States (*e.g.*, Virginia) to adopt price floors paralleling those in the very Model Regulations to which Congress referred. LPI's lament about the market effects of Virginia's "onerous registration requirements" and "artificial price floors" (Petition, p. 8) is thus shown to be nothing more than a policy dispute with Congress.

It is significant that Congress referred to the NAIC Model Act and Regulations in § 101(g)(2)(B)(i) and (ii). Having enabled tax-free proceeds for viators if their home State licenses viatical providers, Congress thereby encouraged States to adopt licensing statutes patterned after the Model Act and Regulations. It hardly bears argument that by making certain income tax-free to residents if States legislate in a certain way, Congress "affirmatively contemplated" that States would legislate in precisely that way, as did Virginia. *See South-Central Timber*, 467 U.S. at 91-92.

The Fourth Circuit considered this Tax Code provision as buttressing its conclusion that the McCarran-Ferguson Act saves the Virginia Laws from challenge under the dormant Commerce Clause. *Life Partners,* 484 F.3d at 299. The Tax Code, however, provides even broader protection than the McCarran-Ferguson Act. Although the latter statute shields States from federal intrusion into matters of insurance in a general sense, and is thus a "hands-off" statute, the Tax Code provision intentionally *stimulated* State regulation of viatical settlements in order to confer substantial tax benefits on in-state viators.

Accordingly, even aside from the McCarran-Ferguson Act, Congress affirmatively contemplated State legislation in the form of the Virginia Laws, thereby insulating such legislation from challenge under the dormant Commerce Clause. As pointed out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), "this Court reviews judgments, not opinions . . . ." There is thus no reason to grant LPI's petition when the result of this appeal (upholding the Virginia Laws) would be the same—regardless of the Court's resolution of the McCarran-Ferguson Act questions.

McCarran-Ferguson Act

The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (the "Act") restored States' traditional preeminence in the field of insurance. *See United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 507 (1993). In 15 U.S.C. § 1011, Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the

public interest, and . . . silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Because the dormant Commerce Clause by definition bespeaks silence on Congress's part, § 1011 is an important Congressional policy statement limiting the potential impact of the dormant Commerce Clause on state laws regulating insurance.

The next section is § 1012, which provides:

> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State *for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided [that the Antitrust Laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

Id. (emphasis supplied). Art. I, § 8, cl. 3 of the U. S. Constitution delegates to Congress authority over interstate commerce, and contains "a further, negative command, known as the dormant Commerce Clause," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995), that "create[s] an area of trade free from interference by the States," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (internal quotation marks omitted). The dormant Commerce Clause lies at the center of this case.

Although neither § 1011 nor § 1012 mentions the dormant Commerce Clause, this Court has held that the Act removed "obstructions that might be thought to flow from [Congress's] own power, *whether dormant or exercised.*" *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 430 (1946) (emphasis supplied). The Court repeated that message in *American Ins. Assn. v. Garamendi,* 539 U.S. 396, 428 (2003) ("the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised."). There is no question that if the McCarran-Ferguson Act applies, it will insulate the Virginia Laws from LPI's dormant Commerce Clause challenge.

The Business of Insurance

The McCarran-Ferguson Act refers to "the business of insurance" five times: once each in Sections 1011 and 1012(a) and three times in Section 1012(b). In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982), the Court directed lower courts

analyzing the meaning of the term "business of insurance" to consider "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* This Court has held that none of the enumerated criteria was "necessarily determinative in itself," *see id.,* and, indeed, not all three factors need be satisfied in order for the Act to protect State laws. *See Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 373 (2002) (*Pireno* factors are "guideposts;" court may leave open the question whether a practice spreads policyholder risk where "second and third factors are clearly satisfied . . . .").

Section 1012(a)

At least two circuit courts of appeal conclude that 15 U.S.C. § 1012(a) (*i.e.*, § 2(a) of the Act) protects State regulation of insurance from the dormant Commerce Clause. *See Ruthardt v. United States,* 303 F.3d 375 (1st Cir. 2002*), cert. denied sub nom Ala. Ins. Guar. Ass'n. v. United States,* 538 U.S. 1031 (2003). The First Circuit noted that "Section 2(a) of the statute effectively safeguards state insurance regulation against preemption through the dormant Commerce Clause doctrine." *Ruthardt,* 303 F.3d at 380, n. 2 (*dicta*). The Third Circuit reached the same conclusion in a case that did not involve the dormant Commerce Clause, *Lac D'Amiante du Quebec, Ltee., v. American Home Assurance Company,* 864 F.2d 1033, 1038-39 (3rd Cir. 1988) ("15 U.S.C. § 1012(a) . . . frees state

insurance regulation from the negative force of the dormant commerce clause . . . .").

LPI states (Petition, p. 24, fn. 2): "[t]his Court has held that it is Section 2(a)—not Section 2(b) of the McCarran-Ferguson Act that 'operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack,'" citing *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 218, n. 18 (1979). The *Royal Drug* footnote, however, does not mention Section 2(a) or 2(b). Indeed, the text of the opinion states that § 2(a) is not involved in the case. The complete text of *Royal Drug* footnote 18 is "The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack," without further focus on whether it is Section 2(a) or 2(b) that provides such protection.

Regardless of whether § 1012(a) or § 1012(b) applies, in the decision below (*Life Partners v. Morrison,* 484 F.3d 284 (4th Cir. 2007)), Judge Niemeyer analyzed the facts under every possible approach under the McCarran-Ferguson Act, beginning with the "relate to" language from § 2(a). The panel recognized that the words "relate to" merit an expansive interpretation, citing *N.Y. State Conf. v. Blue Cross & Blue Shield Plans v. Travelers,* 514 U.S. 645, 655 (1995), an ERISA case. *See Life Partners,* 484 F.3d at 296-97. LPI criticized this approach, arguing that this Court effected a "clean break" between the Act and ERISA (Petition, p. 24, citing *Kentucky Ass'n. of Health Plans, Inc. v. Miller,* 538 U.S. 329, 341 (2003)). The phrase "relate to", however, is entitled to an expansive

interpretation no matter what the context, ERISA or otherwise. *See, e.g., Barnett Bank of Marion Cty., N. A. v. Nelson,* 517 U.S. 25, 38 (1996), a McCarran-Ferguson case:

> The word "relates" is highly general, and this Court has interpreted it broadly in other pre-emption contexts. See, *e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47 (1987) (words "relate to" have "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan '. . . if it has a connection with or reference to such a plan'") (quoting *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739 (1985), in turn quoting *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97 (1983)); *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383-384 (1992) (interpreting similarly the words "relating to" in the Airline Deregulation Act of 1978).

Id. (internal punctuation edited). *Barnett* made the further common-sense observation that "a statute may specifically relate to more than one thing. Just as an ordinance forbidding dogs in city parks specifically relates to dogs and to parks, so a statute permitting banks to sell insurance can specifically relate to banks and to insurance." *Id.,* 517 U.S. at 41-42.

The Virginia Laws (i) provide consumer protection to viators who wish to sell their insurance policies; (ii) establish a licensing and regulatory

regime governing providers and brokers who facilitate the purchase of insurance policies from viators; and (iii) prescribe procedures designed to minimize fraud and deception in the sale of insurance policies. *Life Partners,* 484 F.3d at 296. The Virginia Laws also impose duties on insurers. *See* Va. Code § 38.2-6008.A.3 and A.4. The panel thus reasonably concluded that the Virginia Laws "relate to" the business of insurance because they address key aspects of insurance contracts, including "the marketing, sale, execution, performance, and administration of insurance contracts." *Life Partners,* 484 F.3d at 297. Accordingly, if § 1012(a) applies to this case, there was abundant record evidence proving that the Virginia Laws relate to the business of insurance.

Section 1012(b)

Having determined that the Virginia Laws survive scrutiny under § 1012(a), the Fourth Circuit next undertook to analyze the Virginia Laws from the perspective of § 1012(b), starting with the impact of *Fabe*, which explained the two clauses of § 1012(b):

> The language of § 2(b) is unambiguous: The first clause commits laws 'enacted . . . for the purpose of regulating the business of insurance' to the States, while the second clause exempts only 'the business of insurance' itself from the antitrust laws. To equate laws 'enacted . . . for the purpose of regulating the business of insurance' with the 'business of insurance' itself,

> as petitioners urge us to do, would be to read words out of the statute. This we refuse to do.

508 U.S. at 504. *Fabe* established the standard by which to interpret the phrase "enacted . . . for the purpose of regulating the business of insurance" in the first clause. The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. This category necessarily encompasses more than just the "business of insurance." *Life Partners,* 484 F.3d at 298 (quoting *Fabe,* 508 U.S. at 505).

Adopting a similar rationale as it used with respect to the "relate to" language from § 1012(a), the panel looked to the effects of the Virginia Laws and held that they were enacted "for the purpose of regulating the business of insurance." The Fourth Circuit cited *Securities and Exch. Comm'n v. National Securities,* 393 U.S. 453 (1969) where this Court distinguished laws focused on protecting stockholders of an insurer (to which it held the McCarran-Ferguson Act inapplicable) from laws aimed at protecting those purchasing insurance policies (*i.e.*, insureds). *Id.* at 460, 462-63 (cited in *Life Partners*, 484 F.3d at 298). The Fourth Circuit also considered the numerous connections that the Virginia Laws have with insurers and insureds, including the requirement "that [viators] receive a fair price from licensed providers for the policies that become the subject of viatical settlements." *Life Partners,* 484 F.3d at 298. The panel looked to *Fabe*, where this Court held that a state law assigning

priority in an insurance company's bankruptcy proceeding was passed "for the purpose of regulating the business of insurance." *Fabe,* 508 U.S. at 504. If such a law met the "for the purpose" standard, "then surely a statute regulating the transferability of life insurance policies is also passed for the purpose of regulating the business of insurance." *Life Partners,* 484 F.3d at 298.

The panel's approach comports with the common-sense meaning of the words in the Act. If a State, for example, were to pass a law barring private resale of lottery tickets, no one would seriously question that the law was enacted "for the purpose of regulating" the business of conducting a lottery. Indeed, it should be *a priori* evident that a statutory scheme aimed at constraining the resale of insurance policies was enacted for the purpose of regulating the business of insurance. Thus, if the "for the purpose of regulating the business of insurance" language from § 1012(b) applies, the Fourth Circuit correctly held that the Act protects the Virginia Laws.

Virginia Laws Regulate the Business of Insurance

The Fourth Circuit next determined that the Virginia Laws so closely impact the insured-insurer relationship, and have such tangible effects on insureds and insurers, that they fall within "the McCarran-Ferguson Act's core protection of laws that actually regulate the "business of insurance." *Life Partners,* 484 F.3d at 298. The panel held that the Virginia Laws survive scrutiny in light of the three *Pireno* inquiries.

The first question is whether the law under review targets practices or provisions that "ha[ve] the effect of transferring or spreading a policyholder's risk." *Rush Prudential HMO,* 536 U.S. at 373 (citing *Pireno*, 458 U.S. at 129). Viatical settlements do result in the transfer of risk. As the Fourth Circuit observed, a viatical settlement "fractures the two-part insurance contract between the insurer and the insured and creates a new tripartite arrangement . . . among the insurer, the insured [and the provider]." *Life Partners,* 484 F.3d at 295. The insurer's risk is distorted because a viaticated policy will never lapse or be canceled: the more policies viaticated, the greater the distortion of the insurer's risk profile.

The effect on the policyholder's risk is even more dramatic. An insured buys a policy in order to hedge the economic risk of an early death, and agrees to make modest premium payments to assure a large payout upon the insured's early death. After a viatical settlement, however, the viator transfers his risk by changing the bet: the viator accepts an immediate payment of an amount less than the policy's face value in exchange for not having to pay premiums in the future (and also agrees to have outsiders monitor the viator's health and medical status until the viator's death). In addition, after a viatical settlement, the viatical investors run the risk of a long-lived viator, hoping (how else to put it?) for the viator's early death. That distinct risk – that the insured might live a long life – did not even exist prior to viatication, because when a policy is issued, both the insured and the insurer benefit (albeit in different ways) from the insured's long life. As can be seen from this analysis, the transfer of

risk among the various parties to viatical settlements is obvious and material.

Second, the viatical settlements are a "practice" that is integral to the policy relationship between the insurer and the insured. The insured-insurer relationship begins as bipartite, but after a viatical settlement, it is tripartite. The insurer has new obligations that did not exist prior to the viatical settlement: it must receive and respond to coverage inquiries, and disclose to the viatical provider whether it intends to pursue a fraud investigation. Va. Code § 38.2-6008(A)(3) and (4). Of course, the Virginia Laws are primarily focused on insureds, and provide consumer protections for terminally-ill persons considering whether to sell their insurance policies. Clearly, the right to own a life insurance policy, the right to receive the face amount upon the insured's death, and the right to change a beneficiary, are all integral to the policy relationship between insurer and insured. *See Life Partners,* 484 F.3d at 298, where the panel noted that after a viatical settlement, "the insured, whose life remains the insurable interest, is given new duties and has reduced rights under the policy." *See also Unum Life Ins. Co. of America v. Ward,* 526 U.S. 358, 374 (1999) (state law satisfied second *Pireno* factor because "California's rule changes the bargain between insurer and insured; it 'effectively creates a mandatory contract term' that requires the insurer to prove prejudice before enforcing a timeliness-of-claim provision."). In similar respect, but with even more consequence, the Virginia Laws create mandatory contract terms that (i) obligate the insurer to perform certain acts when a policy is viaticated; (ii) impose restrictions on insureds who

wish to sell their policies (*e.g.*, by requiring minimum prices); and (iii) create new entitlements to insureds who sell their policies (*e.g.*, affirmative disclosures, right of rescission). Also, the viatical settlement results in elimination of the viator's right to sell or cash-in the policy. Viatical settlements thus materially change policy obligations and are clearly integral to the insured-insurer relationship.

The third *Pireno* inquiry is whether the activity is limited to entities within the insurance industry. Of course, *Pireno* made clear that no single element is determinative, 458 U.S. at 129, and *Rush Prudential HMO* held that a factor may be disregarded if the other *Pireno* factors make clear that the state law is entitled to protection under the Act. *Id.*, 536 U.S. at 373. Indeed, *Pireno* held that there is not a *per se* rule that practices involving non-insurance-industry entities always fall outside of the "business of insurance." *Id.*, 458 U.S. at 133. With the first two factors here militating strongly in favor of applying the McCarran-Ferguson Act, the third factor might well be disregarded. The *Pireno* factors, however, are guideposts, *see Rush Prudential HMO*, 536 U.S. at 373, and in fact those guideposts properly navigated lead to the conclusion that the third *Pireno* factor is indeed satisfied.

In *Securities and Exch. Comm'n v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), the Court held that "[s]tatutes aimed at protecting or regulating this [insured-insurer] relationship, *directly or indirectly*, are laws regulating the 'business of insurance.'" *Id.* (emphasis supplied). The Virginia Laws regulate the business of insurance both directly and indirectly, by protecting

insureds who wish to sell an insurance policy, and by protecting insurers (by, *e.g.*, providing for fraud investigations). To accomplish that protection, the laws regulate insurance-policy buyers and their agents (providers and brokers), policy sellers (insureds), and the party obligated by contract to perform the service required by the policy (insurers). In that context, the Virginia Laws are truly aimed at entities operating *within* the insurance industry. To put it another way, LPI may not be an "insurer," but its corporate mission is to purchase insurance policies from insureds. Surely, a common-sense understanding of viatical settlements, and using words in their plain meaning, leads to the conclusion that the Virginia Laws are aimed at entities operating "within" the insurance industry.

Accordingly, in its careful consideration of how viatical settlements work, and in its faithful application of the *Pireno* factors, the Fourth Circuit reasonably concluded that the Virginia Laws regulate the "business of insurance." *Life Partners*, 484 F.3d at 299.

Although LPI asserts that the Virginia Laws apply "to transactions that Virginia residents enter into both inside and outside the Commonwealth" (citing Va. Code § 38.2-6002), Petition, p. 28, the Bureau of Insurance has never enforced the Virginia Laws when the viatical settlement is entirely foreign, *i.e.*, a transaction that involved no activity in the Commonwealth of Virginia. C.A.J.A. 108. Moreover, because this case is an as-applied challenge, and because the Jane Doe transaction indisputably involved activities that occurred within the Commonwealth of Virginia, LPI's allegation of

extra-territorial application is irrelevant, moot, and wrong.

No Circuit Split

There is no split of authority among the circuit courts of appeal concerning the McCarran-Ferguson Act as would affect the resolution of this case. LPI cited cases from different circuits where the facts differ so fundamentally from those here that it is not surprising courts reached different conclusions as to whether the Act applied to the facts under review. Tellingly, none of those cases involved viatical settlements, which involve the sale of insurance policies.

LPI first cites *Genord v. Blue Cross & Blue Shield of Mich.*, 440 F.3d 802 (6th Cir. 2006). *Genord* involved a billing dispute between a group of doctors and an insurance company. The doctors claimed that Blue Cross & Blue Shield of Michigan ("BCBS") had violated civil RICO statutes by delaying or denying claims under health insurance policies. BCBS argued that RICO was reverse-preempted by § 1012(b) of the McCarran-Ferguson Act, because the Michigan Health Care Act governed their conduct, and that Act was enacted for the purpose of regulating the business of insurance. *Id.* at 806. The panel held that none of the three *Pireno* criteria were met: the billing practices under challenge did not spread policyholder risk; the parts of the Health Care Act at issue were not an integral part of the policy relationship because the policyholders are unconcerned with how doctors get paid; and doctors are not considered entities within the insurance industry. *Id.* at 807-809. This case is unlike *Genord*

because the Virginia Laws regulate the sale of insurance policies by insureds, not payments by insurers to third parties. *Genord* also sensibly analyzed *Fabe* and *Pireno* (and *Royal Drug*) as harmonious approaches to the McCarran-Ferguson Act, *see Genord,* 440 F.3d at 807-08, rebutting LPI's argument that *Fabe* somehow conflicts with those earlier McCarran-Ferguson cases. Petition, p. 25.

Next, LPI cites *Prudential Insurance Co. of America, et. al. v. National Park Medical Center Inc.*, 154 F.3d 812 (8th Cir. 1998), where under challenge was an Arkansas law that required health insurers to include in their plans any health-care providers willing to accept the insurer's requirements. The insurer wished to choose its own providers, and argued that the law was barred by ERISA. The Eighth Circuit applied § 1012(b) analysis and rejected that argument, because the Arkansas law had at most an attenuated connection to the insured-insurer relationship. 154 F.3d at 830. Here, in contrast, the Virginia Laws directly regulate the insured-insurer relationship, and focus on the sale of the ownership rights to the policy itself. In fact, the McCarran-Ferguson Act was a sidelight in *Prudential*, because the panel's main focus was on ERISA preemption, making it inapt for purposes of comparison to this case.

LPI also cites *Davis v. Centennial Life Ins. Co.*, 128 F.3d 934, 942 (6th *Cir.* 1997), which involved a state law that did not affect the terms of the underlying insurance contract, so the *Pireno* factors were found not satisfied. Here, in contrast, Jane Doe's contract (*i.e.*, for her beneficiary to receive a $115,000 death benefit) was changed materially by

her viatical settlement, as were her duties and the insurer's duties under the contract of insurance, as discussed in detail above.

Finally, LPI cites *Liberty Glass Co., Inc. v. Allstate Insurance Co., et al.*, 607 F.2d 135 (5th Cir. 1979) for the proposition that "the business of insurance does not encompass agreements between insurers and third party providers of goods and services." Pet. for Writ of Cert. 16. *Liberty Glass* involved a lawsuit by firms selling and installing automobile glass against a glass manufacturer and auto insurance companies, alleging collusion and antitrust violations. The Fifth Circuit analyzed the case under § 1012(b), and held that the defendants' collusive agreement involved neither risk-spreading nor the insured-insurer relationship. The collusive agreements were held to potentially aid policyholders (by reducing repair costs), but were found not to be the "business of insurance." *Id.* at 137. The differences between *Liberty Glass* (a pre-*Fabe* opinion) and the case at bar are obvious: that case dealt with replacing windshields; this case involves the protection of insureds who sell their insurance policies.

These cases do not reveal a circuit split. In fact, if this Court finds that § 1012(a) applies, the foregoing cases are inapposite because all were decided pursuant to § 1012(b), and none involved the dormant Commerce Clause. Even if § 1012(b) governs this case, the facts in those four cases are removed from the actual business of insurance. In none of them were the rights of policyholders *in the insurance policy* affected or altered. Each turned on the relationship between the insurer and a third

party, and in each the substantive rights of the policyholders, and the rights of the insurer vis-à-vis the policy itself remained unaltered. The case at bar, in contrast, deals with the resale of insurance policies, with effects on the insured and insurer, thus falling within the heartland of State statutes which the McCarran-Ferguson Act was designed to protect. Not only is there no circuit split on this issue, the only other viatical settlements case to have reached a circuit court of appeals resulted in affirmance of a district court's judgment that the Georgia Life Settlements Act was protected by the McCarran-Ferguson Act because it "regulates . . . core aspects of the business of insurance." *Nat'l. Viatical, Inc. v. Oxendine,* 2006 U.S. Dist. LEXIS 25851, at *6 (N.D. Ga. 2006) (*aff'd without opinion*, 221 F. App'x. 899 (11th Cir. 2007)).

Securities-Side Cases Are Irrelevant

LPI argues that the Fourth Circuit ruling conflicts with cases holding that viatical settlements are not the business of insurance. Petition, p. 18. LPI glosses over the fact that those cases involved the *securities side* of a viatical transaction, where the provider syndicates the ownership interest in the policy to investors. *See, e.g., Securities and Exch. Comm'n v. Life Partners, Inc.*, 87 F.3d 536, 542 (D.C. Cir. 1996) ("LPI I"). The securities side of a viatical settlement is manifestly different from the insurance side, and involves entirely separate concerns. Only the insurance side of a viatical settlement merits analysis under the McCarran-Ferguson Act, which is, after all, an insurance-focused statute, not a securities-focused statute. *See National Securities,* 393 U.S. at 460 ("This [a state law governing

insurance company mergers] is not insurance regulation, it is securities regulation."). The Fourth Circuit repeatedly emphasized this distinction. *Life Partners,* 484 F.3d at 289-90, 298, 300. LPI also cited *Life Partners, Inc. v. Life. Ins. Co. of N. Am.,* 1998 U.S. Dist. LEXIS 23544, at *8 (W.D. Tex. 1998), *aff'd on other grounds*, 203 F.3d 324 (5th Cir. 1999), but that case engaged in no principled analysis, applied anti-trust analysis to a non-antitrust case, and relied by rote on LPI I, which was a securities-side decision.

No Reason to Revisit or Overrule *Fabe*

There is no reason to re-examine or overrule *Fabe*. *Fabe* deals with the first clause of § 1012(b), and is not even implicated if § 1012(a) applies. In any event, the Fourth Circuit reasonably integrated *Fabe* and *Pireno*. The panel held that in order to determine the meaning of "for the purpose of regulating the business of insurance" in § 1012(b), it is necessary to examine the *Pireno* factors as guideposts to the words "business of insurance." *See Life Partners,* 484 F.3d at 299. *Fabe's* focus on the words "for the purpose of regulating," moreover, is an unexceptional exercise of the established principle that courts should "give effect, if possible, to every clause and word of a statute." *Moskal v. United States,* 498 U.S. 103, 109-110 (1990) (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).

Justice Kennedy's dissent in *Fabe* recognized the validity of this approach, observing that the words "for the purpose of regulating" mean something significant: "It is true that laws enacted

for the purpose of regulating the business of insurance are something different from activities of insurers constituting the business of insurance, but in my mind this distinction does not compel a conclusion that cases such as *Royal Drug* and *Pireno* have no application here." 508 U.S. at 515 (Kennedy, J., dissenting) (internal citation omitted). His concern was that the Court not jettison *Pireno* from the examination of the "business of insurance." *Id.* *Life Partners* satisfied the dissent's concerns, because the panel did apply the *Pireno* factors in determining that the Virginia Laws were enacted "for the purpose of regulating the business of insurance." *Life Partners,* 484 F.3d at 298-99.

Finally, the dissent said that "the most serious flaw of [*Fabe*'s] analytic approach" was the Court's holding that the insolvency statute at issue was only partly a regulation of the business of insurance. Justice Kennedy believed "that a law enacted to determine the priority of creditor claims in proceedings to liquidate an insolvent insurance company either is the regulation of the business of insurance or is not." *Id.,* 508 U.S. at 517-518 (Kennedy, J., dissenting). The case at bar, in contrast, is not a state insolvency statute, does not involve consideration whether only parts of the Virginia Laws are protected by the Act, and is therefore an inapt vehicle through which to address the *Fabe* dissent's principal concern.

Pike Balancing Issues

LPI concludes by arguing that the benefits of the Virginia Laws are outweighed by the costs of complying with them, that the Virginia Laws pose

conflicts with Texas laws, and that the Fourth Circuit's opinion will have "potentially devastating" consequences for business sectors outside the insurance industry. These concerns are unjustified.

Pike v. Bruce Church, Inc.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Court held that a non-discriminatory state law with only incidental effects on commerce will survive challenge under the dormant Commerce Clause unless the burden on commerce is "clearly excessive" compared with the putative benefits of the statute. *Id.* In the case at bar, the District Court conducted a comprehensive analysis of the benefits and burdens of the Virginia Laws, and found that the benefits clearly outweighed the burdens. *See Life Partners, Inc. v. Miller,* 420 F. Supp. 2d 452, 467 (E.D. Va. 2006). In particular, the court held that the burdens of complying with the Virginia Laws are "similar to those governing such other industries as banking, insurance and security dealers." The benefits of the Virginia Laws are obvious: consumer protection for terminally-ill viators. In addition, the Virginia Laws establish a licensing regime such that in-state viators would receive tax-free proceeds as envisioned by Congress in 26 U.S.C. § 101(g)(2), clearly a significant benefit.

That businesses must comply with *multiple* states' regulations does not impermissibly burden interstate commerce. *See Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917), *Caldwell v. Sioux Falls Stock Yards*, 242 U.S. 559 (1917) and *Merrick v. N.W. Halsey & Co.*, 242 U.S. 569 (1917)(the "Blue Sky" cases). The Blue Sky cases all involved Commerce

Clause challenges, and in each the Court upheld State securities laws, because the laws applied only to in-State activities. The same rationale applies here, except with more force, because Congress provided an express incentive for States to license viatical providers, *see* 26 U.S.C. § 101(g)(2)(B), and it was inevitable that dozens of States would do so, in order to achieve tax-free income for their citizens. Hence, because Congress spurred enactment of licensing laws, LPI cannot complain that complying with them impermissibly burdens interstate commerce. In having to comply with regulatory regimes of many States, LPI is in the same position as countless other businesses in the financial services industry, including interstate banks, securities sellers and brokers, and marketers of other consumer-related financial services, as the District Court recognized.

Virginia Laws Do Not Conflict With Other States' Laws

This is an as-applied challenge. C.A.J.A. 699. Although LPI alleges that the Virginia Laws conflict with the Texas licensing statutes, Petition, p. 28, there was no such conflict in the case at bar. Indeed, the District Court ruled that two conflicts alleged by LPI were in fact illusory, and refused to undertake a line-by-line analysis of a cryptic exhibit (C.A.J.A. 260-65) tendered by LPI that purported to illustrate other conflicts. *See Life Partners, Inc. v. Miller,* 420 F. Supp. 2d at 466, n. 2 (LPI is attempting "to create a conflict where one does not exist."). LPI's statement (Petition, p. 28), that Virginia and Texas law conflict with regard to fiduciary duty owed by a broker is purely hypothetical, because Jane Doe *did*

have a written agreement with her broker, making the broker Doe's fiduciary—the same as he would have been in Texas.

Unwarranted Fears

No LPI brief is complete without a parade of horribles. LPI here strikes the tocsin to warn that the Fourth Circuit's ruling portends "potentially devastating" consequences for pharmacies and nursing homes, as well as for the manufacturers of fuel injectors, axles, and bumpers, all evidently facing ruin because the Virginia Laws regulate viatical settlements. Petition, p. 26. The record of this case, however, contains no evidence that State laws patterned after the Model Act have had or will have any impact whatsoever outside the area of viatical settlements. Moreover, Congress enacted 26 U.S.C. § 101(g)(2) to spur viatical settlement regulation by the States; Congress must be presumed to be aware of the consequences of its legislation. *See NASA v. FLRA*, 527 U.S. 229, 245 (1999) (when enacting a statute, "[w]e must presume . . . that Congress took account of the policy concerns on both sides of the balance . . . ."). In any event, the industries about which LPI frets lie outside the business of insurance, and have nothing to fear from a principled application of the McCarran-Ferguson Act to the sale of insurance policies.

LPI also fancifully speculates that the Fourth Circuit's ruling might result in a host of blatantly discriminatory and unconstitutional enactments by the Virginia General Assembly. Petition, p. 27. LPI's musings should be ignored. No such

legislation exists, and in an as-applied challenge, LPI's alarums are irrelevant.

CONCLUSION

For the foregoing reasons, the Court should deny LPI's petition for writ of certiorari.

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No. 07-261

IN THE

Supreme Court of the United States

LIFE PARTNERS, INC.

PETITIONER,

V.

THEODORE V. MORRISON, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VIRGINIA STATE CORPORATION COMMISSION, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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APPENDIX A

26 USCS § 101

§ 101. Certain death benefits.

(a) Proceeds of life insurance contracts payable by reason of death.

(1) General rule. Except as otherwise provided in paragraph (2), subsection (d), subsection (f), and subsection (j), gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured.

(2) Transfer for valuable consideration. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance contract or any interest therein, the amount excluded from gross income by paragraph (1) shall not exceed an amount equal to the sum of the actual value of such consideration and the premiums and other amounts subsequently paid by the transferee. The preceding sentence shall not apply in the case of such a transfer

(A) if such contract or interest therein has a basis for determining gain or loss in the hands of a transferee determined in whole or in part by reference to such basis of such contract or interest therein in the hands of the transferor, or

(B) if such transfer is to the insured, to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer.

The term "other amounts" in the first sentence of this paragraph includes interest paid or accrued by the transferee on indebtedness with respect to such contract or any interest therein if such interest paid or accrued is not allowable as a deduction by reason of section 264(a)(4) [26 USCS § 264(a)(4)].

(b) Repealed.

(c) Interest. If any amount excluded from gross income by subsection (a) is held under an agreement to pay interest thereon, the interest payments shall be included in gross income.

(d) Payment of life insurance proceeds at a date later than death.

(1) General rule. The amounts held by an insurer with respect to any beneficiary shall be prorated (in accordance with such regulations as may be prescribed by the Secretary) over the period or periods with respect to which such payments are to be made. There shall be excluded from the gross income of such beneficiary in the taxable year received any amount determined by such proration. Gross income includes, to the extent not excluded by the preceding sentence, amounts received under agreements to which this subsection applies.

(2) Amount held by an insurer. An amount held by an insurer with respect to any beneficiary shall mean an amount to which subsection (a) applies which is—

(A) held by any insurer under an agreement provided for in the life insurance contract, whether as an option or otherwise, to pay such amount on a date or dates later than the death of the insured, and

(B) equal to the value of such agreement to such beneficiary

(i) as of the date of death of the insured (as if any option exercised under the life insurance contract were exercised at such time), and

(ii) as discounted on the basis of the interest rate used by the insurer in calculating payments under the agreement and mortality tables prescribed by the Secretary.

(3) Application of subsection. This subsection shall not apply to any amount to which subsection (c) is applicable.

(e) Repealed.

(f) Proceeds of flexible premium contracts issued before January 1, 1985 payable by reason of death.

(1) In general. Any amount paid by reason of the death of the insured under a flexible premium life insurance contract issued before January 1, 1985 shall be excluded from gross income only if—

(A) under such contract—

(i) the sum of the premiums paid under such contract does not at any time exceed the guideline premium limitation as of such time, and

(ii) any amount payable by reason of the death of the insured (determined without regard to any qualified additional benefit) is not at any time less than the applicable percentage of the cash value of such contract at such time, or

(B) by the terms of such contract, the cash value of such contract may not at any time exceed the net single premium with respect to the amount payable by reason of the death of the insured (determined without regard to any qualified additional benefit) at such time.

(2) Guideline premium limitation. For purposes of this subsection—

(A) Guideline premium limitation. The term "guideline premium limitation" means, as of any date, the greater of—

(i) the guideline single premium, or

(ii) the sum of the guideline level premiums to such date.

(B) Guideline single premium. The term "guideline single premium" means the premium at issue with respect to future benefits under the contract (without regard to any qualified additional benefit), and with respect to any charges for

qualified additional benefits, at the time of a determination under subparagraph (A) or (E) and which is based on—

(i) the mortality and other charges guaranteed under the contract, and

(ii) interest at the greater of an annual effective rate of 6 percent or the minimum rate or rates guaranteed upon issue of the contract.

(C) Guideline level premium. The term "guideline level premium" means the level annual amount, payable over the longest period permitted under the contract (but ending not less than 20 years from date of issue or not later than age 95, if earlier), computed on the same basis as the guideline single premium, except that subparagraph (B)(ii) shall be applied by substituting "4 percent" for "6 percent".

(D) Computational rules. In computing the guideline single premium or guideline level premium under subparagraph (B) or (C)—

(i) the excess of the amount payable by reason of the death of the insured (determined without regard to any qualified additional benefit) over the cash value of the contract shall be deemed to be not greater than such excess at the time the contract was issued,

(ii) the maturity date shall be the latest maturity date permitted under the contract, but not less than 20 years after the date of issue or (if earlier) age 95, and

(iii) the amount of any endowment benefit (or sum of endowment benefits) shall be deemed not to exceed the least amount payable by reason of the death of the insured (determined without regard to any qualified additional benefit) at any time under the contract.

(E) Adjustments. The guideline single premium and guideline level premium shall be adjusted in the event of a change in the future benefits or any qualified additional benefit under the contract which was not reflected in any guideline single premiums or guideline level premium previously determined.

(3) Other definitions and special rules. For purposes of this subsection—

(A) Flexible premium life insurance contract. The terms "flexible premium life insurance contract" and "contract" mean a life insurance contract (including any qualified additional benefits) which provides for the payment of one or more premiums which are not fixed by the insurer as to both timing and amount. Such terms do not include that portion of any contract which is treated under State law as providing any annuity benefits other than as a settlement option.

(B) Premiums paid. The term "premiums paid" means the premiums paid under the contract less any amounts (other than amounts includible in gross income) to which section 72(e) [26 USCS § 72(e)] applies. If, in order to comply with the requirements of paragraph (1)(A), any portion of any premium paid during any contract year is returned

by the insurance company (with interest) within 60 days after the end of a contract year—

(i) the amount so returned (excluding interest) shall be deemed to reduce the sum of the premiums paid under the contract during such year, and

(ii) notwithstanding the provisions of section 72(e) [26 USCS § 72(e)], the amount of any interest so returned shall be includible in the gross income of the recipient.

(C) Applicable percentage. The term "applicable percentage" means—

(i) 140 percent in the case of an insured with an attained age at the beginning of the contract year of 40 or less, and

(ii) in the case of an insured with an attained age of more than 40 as of the beginning of the contract year, 140 percent reduced (but not below 105 percent) by one percent for each year in excess of 40.

(D) Cash value. The cash value of any contract shall be determined without regard to any deduction for any surrender charge or policy loan.

(E) Qualified additional benefits. The term "qualified additional benefits" means any—

(i) guaranteed insurability,

(ii) accidental death benefit,

(iii) family term coverage, or

(iv) waiver of premium.

(F) Premium payments not disqualifying contract. The payment of a premium which would result in the sum of the premiums paid exceeding the guideline premium limitation shall be disregarded for purposes of paragraph (1)(A)(i) if the amount of such premium does not exceed the amount necessary to prevent the termination of the contract without cash value or on before the end of the contract year.

(G) Net single premium. In computing the net single premium under paragraph (1)(B)—

(i) the mortality basis shall be that guaranteed under the contract (determined by reference to the most recent mortality table allowed under all State laws on the date of issuance),

(ii) interest shall be based on the greater of—

(I) an annual effective rate of 4 percent (3 percent for contracts issued before July 1, 1983), or

(II) the minimum rate or rates guaranteed upon issue of the contract, and

(iii) the computational rules of paragraph (2)(D) shall apply, except that the maturity date referred to in clause (ii) thereof shall not be earlier than age 95.

(H) Correction of errors. If the taxpayer establishes to the satisfaction of the Secretary that—

(i) the requirements described in paragraph (1) for any contract year was not satisfied due to reasonable error, and

(ii) reasonable steps are being taken to remedy the error,

the Secretary may waive the failure to satisfy such requirements.

(I) Regulations. The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(g) Treatment of certain accelerated death benefits.

(1) In general. For purposes of this section, the following amounts shall be treated as an amount paid by reason of the death of an insured:

(A) Any amount received under a life insurance contract on the life of an insured who is a terminally ill individual.

(B) Any amount received under a life insurance contract on the life of an insured who is a chronically ill individual.

(2) Treatment of viatical settlements.

(A) In general. If any portion of the death benefit under a life insurance contract on the life of an insured described in paragraph (1) is sold

or assigned to a viatical settlement provider, the amount paid for the sale or assignment of such portion shall be treated as an amount paid under the life insurance contract by reason of the death of such insured.

(B) Viatical settlement provider.

(i) In general. The term "viatical settlement provider" means any person regularly engaged in the trade or business of purchasing, or taking assignments of, life insurance contracts on the lives of insureds described in paragraph (1) if—

(I) such person is licensed for such purposes (with respect to insureds described in the same subparagraph of paragraph (1) as the insured) in the State in which the insured resides, or

(II) in the case of an insured who resides in a State not requiring the licensing of such persons for such purposes with respect to such insured, such person meets the requirements of clause (ii) or (iii), whichever applies to such insured.

(ii) Terminally ill insureds. A person meets the requirements of this clause with respect to an insured who is a terminally ill individual if such person—

(I) meets the requirements of sections 8 and 9 of the Viatical Settlements Model Act of the National Association of Insurance Commissioners, and

(II) meets the requirements of the Model Regulations of the National Association of

Insurance Commissioners (relating to standards for evaluation of reasonable payments) in determining amounts paid by such person in connection with such purchases or assignments.

(iii) Chronically ill insureds. A person meets the requirements of this clause with respect to an insured who is a chronically ill individual if such person—

(I) meets requirements similar to the requirements referred to in clause (ii)(I), and

(II) meets the standards (if any) of the National Association of Insurance Commissioners for evaluating the reasonableness of amounts paid by such person in connection with such purchases or assignments with respect to chronically ill individuals.

(3) Special rules for chronically ill insureds. In the case of an insured who is a chronically ill individual—

(A) In general. Paragraphs (1) and (2) shall not apply to any payment received for any period unless—

(i) such payment is for costs incurred by the payee (not compensated for by insurance or otherwise) for qualified long-term care services provided for the insured for such period, and

(ii) the terms of the contract giving rise to such payment satisfy—

(I) the requirements of section 7702B(b)(1)(B) [26 USCS § 7702B(b)(1)(B)], and

(II) the requirements (if any) applicable under subparagraph (B).

For purposes of the preceding sentence, the rule of section 7702B(b)(2)(B) [26 USCS § 7702B(b)(2)(B)] shall apply.

(B) Other requirements. The requirements applicable under this subparagraph are—

(i) those requirements of section 7702B(g) [26 USCS § 7702B(g)] and section 4980C [26 USCS § 4980C] which the Secretary specifies as applying to such a purchase, assignment, or other arrangement,

(ii) standards adopted by the National Association of Insurance Commissioners which specifically apply to chronically ill individuals (and, if such standards are adopted, the analogous requirements specified under clause (i) shall cease to apply), and

(iii) standards adopted by the State in which the policyholder resides (and if such standards are adopted, the analogous requirements specified under clause (i) and (subject to section 4980C(f) [26 USCS § 4980C(f)]) standards under clause (ii), shall cease to apply).

(C) Per diem payments. A payment shall not fail to be described in subparagraph (A) by reason of being made on a per diem or other periodic

basis without regard to the expenses incurred during the period to which the payment relates.

(D) Limitation on exclusion for periodic payments. For limitation on amount of periodic payments which are treated as described in paragraph (1), see section 7702B(d) [26 USCS § 7702B(d)].

(4) Definitions. For purposes of this subsection—

(A) Terminally ill individual. The term "terminally ill individual" means an individual who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in 24 months or less after the date of the certification.

(B) Chronically ill individual. The term "chronically ill individual" has the meaning given such term by section 7702B(c)(2) [26 USCS § 7702B(c)(2)]; except that such term shall not include a terminally ill individual.

(C) Qualified long-term care services. The term "qualified long-term care services" has the meaning given such term by section 7702B(c) [26 USCS § 7702B(c)].

(D) Physician. The term "physician" has the meaning given to such term by section 1861(r)(1) of the Social Security Act (42 U.S.C. 1395x(r)(1)).

(5) Exception for business-related policies. This subsection shall not apply in the case of any amount paid to any taxpayer other than the insured

if such taxpayer has an insurable interest with respect to the life of the insured by reason of the insured being a director, officer, or employee of the taxpayer or by reason of the insured being financially interested in any trade or business carried on by the taxpayer.

(h) Survivor benefits attributable to service by a public safety officer who is killed in the line of duty.

(1) In general. Gross income shall not include any amount paid as a survivor annuity on account of the death of a public safety officer (as such term is defined in section 1204 of the Omnibus Crime Control and Safe Streets Act of 1968 [42 USCS § 3796b]) killed in the line of duty—

(A) if such annuity is provided, under a governmental plan which meets the requirements of section 401(a) [26 USCS § 401(a)], to the spouse (or a former spouse) of the public safety officer or to a child of such officer; and

(B) to the extent such annuity is attributable to such officer's service as a public safety officer.

(2) Exceptions. Paragraph (1) shall not apply with respect to the death of any public safety officer if, as determined in accordance with the provisions of the Omnibus Crime Control and Safe Streets Act of 1968—

(A) the death was caused by the intentional misconduct of the officer or by such officer's intention to bring about such officer's death;

(B) the officer was voluntarily intoxicated (as defined in section 1204 of such Act [42 USCS § 3796b]) at the time of death;

(C) the officer was performing such officer's duties in a grossly negligent manner at the time of death; or

(D) the payment is to an individual whose actions were a substantial contributing factor to the death of the officer.

(i) Certain employee death benefits payable by reason of death of certain terrorist victims or astronauts.

(1) In general. Gross income does not include amounts (whether in a single sum or otherwise) paid by an employer by reason of the death of an employee who is a specified terrorist victim (as defined in section 692(d)(4) [26 USCS § 692(d)(4)]).

(2) Limitation.

(A) In general. Subject to such rules as the Secretary may prescribe, paragraph (1) shall not apply to amounts which would have been payable after death if the individual had died other than as a specified terrorist victim (as so defined).

(B) Exception. Subparagraph (A) shall not apply to incidental death benefits paid from a plan described in section 401(a) [26 USCS § 401(a)] and exempt from tax under section 501(a) [26 USCS § 501(a)].

(3) Treatment of self-employed individuals. For purposes of paragraph (1), the term "employee" includes a self-employed individual (as defined in section 401(c)(1) [26 USCS § 401(c)(1)]).

(4) Relief with respect to astronauts. The provisions of this subsection shall apply to any astronaut whose death occurs in the line of duty.

(j) Treatment of certain employer-owned life insurance contracts.

(1) General rule. In the case of an employer-owned life insurance contract, the amount excluded from gross income of an applicable policyholder by reason of paragraph (1) of subsection (a) shall not exceed an amount equal to the sum of the premiums and other amounts paid by the policyholder for the contract.

(2) Exceptions. In the case of an employer-owned life insurance contract with respect to which the notice and consent requirements of paragraph (4) are met, paragraph (1) shall not apply to any of the following:

(A) Exceptions based on insured's status. Any amount received by reason of the death of an insured who, with respect to an applicable policyholder—

(i) was an employee at any time during the 12-month period before the insured's death, or

(ii) is, at the time the contract is issued—

(I) a director,

(II) a highly compensated employee within the meaning of section 414(q) [26 USCS § 414(q)] (without regard to paragraph (1)(B)(ii) thereof), or

(III) a highly compensated individual within the meaning of section 105(h)(5) [26 USCS § 105(h)(5)], except that "35 percent" shall be substituted for "25 percent" in subparagraph (C) thereof.

(B) Exception for amounts paid to insured's heirs. Any amount received by reason of the death of an insured to the extent—

(i) the amount is paid to a member of the family (within the meaning of section 267(c)(4) [26 USCS § 267(c)(4)]) of the insured, any individual who is the designated beneficiary of the insured under the contract (other than the applicable policyholder), a trust established for the benefit of any such member of the family or designated beneficiary, or the estate of the insured, or

(ii) the amount is used to purchase an equity (or capital or profits) interest in the applicable policyholder from any person described in clause (i).

(3) Employer-owned life insurance contract.

(A) In general. For purposes of this subsection, the term "employer-owned life insurance contract" means a life insurance contract which—

(i) is owned by a person engaged in a trade or business and under which such person (or a related person described in subparagraph (B)(ii)) is directly or indirectly a beneficiary under the contract, and

(ii) covers the life of an insured who is an employee with respect to the trade or business of the applicable policyholder on the date the contract is issued.

For purposes of the preceding sentence, if coverage for each insured under a master contract is treated as a separate contract for purposes of sections 817(h), 7702, and 7702A [26 USCS §§ 817(h), 7702, and 7702A], coverage for each such insured shall be treated as a separate contract.

(B) Applicable policyholder. For purposes of this subsection—

(i) In general. The term "applicable policyholder" means, with respect to any employer-owned life insurance contract, the person described in subparagraph (A)(i) which owns the contract.

(ii) Related persons. The term "applicable policyholder" includes any person which—

(I) bears a relationship to the person described in clause (i) which is specified in section 267(b) or 707(b)(1) [26 USCS § 267(b) or 707(b)(1)], or

(II) is engaged in trades or businesses with such person which are under common control (within the meaning of subsection (a) or (b) of section 52 [26 USCS § 52]).

(4) Notice and consent requirements. The notice and consent requirements of this paragraph are met if, before the issuance of the contract, the employee—

(A) is notified in writing that the applicable policyholder intends to insure the employee's life and the maximum face amount for which the employee could be insured at the time the contract was issued,

(B) provides written consent to being insured under the contract and that such coverage may continue after the insured terminates employment, and

(C) is informed in writing that an applicable policyholder will be a beneficiary of any proceeds payable upon the death of the employee.

(5) Definitions. For purposes of this subsection—

(A) Employee. The term "employee" includes an officer, director, and highly compensated employee (within the meaning of section 414(q) [26 USCS § 414(q)]).

(B) Insured. The term "insured" means, with respect to an employer-owned life insurance contract, an individual covered by the contract who is a United States citizen or resident. In the case of a

contract covering the joint lives of 2 individuals, references to an insured include both of the individuals.